COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, SEPTEMBER 16, 1998

PETITION OF

MCI TELECOMMUNICATIONS CORPORATION
and
MCImetro ACCESS TRANSMISSION
SERVICES OF VIRGINIA, INC.

For arbitration of unresolved
issues from interconnection
negotiations with GTE South, Inc.
pursuant to § 252 of the
Telecommunications Act of 1996

CASE NO. PUC960124

ORDER APPROVING INTERCONNECTION AGREEMENT

On July 17, 1998, the Commission entered its Order Resolving Outstanding Interconnection Disputes and Requiring Filing of Interconnection Agreement requiring GTE South, Inc. ("GTE") and MCI Telecommunications Corporation and MCImetro Access Transmission Services of Virginia, Inc. (collectively "MCI") to submit an interconnection agreement within thirty days. On August 17, 1998, GTE and MCI submitted such a document styled Interconnection, Resale, and Unbundling Agreement ("August Agreement"). That same day, MCI filed its Motion to Compel GTE to Execute the Interconnection Agreement because GTE had declined to sign the August Agreement. Also on that date, GTE filed its Comments on Interconnection Agreement Submitted August 17, 1998 ("Comments"). GTE's Comments gave a legal

analysis of its concerns that the August Agreement contained requirements previously negotiated that were later nullified by the July 18, 1997 decision by the United States Court of Appeals for the Eighth Circuit. See Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir.) petition for cert. granted, AT&T v. Iowa Utilities Board, 118 S. Ct. 879 (1998) (hereafter "Iowa Utils. Bd.").

MCI filed its Response to GTE's Comments ("MCI's Response") on August 21, 1998. MCI's Response argued that GTE's concerns had been previously raised and rejected by the Commission. MCI urged the Commission to deny GTE's request to reject the August Agreement and grant MCI's Motion to Compel GTE to Execute the Agreement.

On September 1, 1998, GTE filed its Reply to both MCI's Motion to Compel and MCI's Response ("GTE's Reply"). GTE's Reply argued that it was not required to sign the August Agreement because that Agreement does not comply with applicable law and has not been approved by the Commission, that the August Agreement is a functional equivalent of a Commission order and is not mutual between consenting parties, that the Telecommunications Act of 1996, 47 U.S.C. § 251 et seq. ("the Act") does not mandate the execution of interconnection agreements arrived at through arbitration, and that GTE's failure to sign the Agreement does not signal an intent by GTE

not to abide by legally promulgated orders of the Commission. In reply to MCI's Response, GTE argued and attached an affidavit that it had repeatedly requested removal of alleged illegal requirements from the negotiated portions of the Agreement, and that the Commission had recognized that its review of an interconnection agreement must be consistent with the law applicable at the time that the agreement is submitted.

The dispute between MCI and GTE may be reconciled by an explanation of our December 17, 1997 Order Denying Motion. In that order, we denied GTE's August 17, 1997 Motion asking the Commission to direct the parties to renegotiate their proposed agreement to conform it to the Iowa Utils. Bd. decision. In declining to direct such renegotiations, the Commission stated "the Commission and the parties need only conform to the standards of §§ 251 and 252 with the knowledge that any determination may be reviewed by a U.S. District Court. At the time the parties submit their agreement for approval pursuant to § 252(e), the Commission will review it according to the law applicable at that time and any reviewing District Court will do the same."

The very next paragraph of that order did revisit one of the Commission's arbitrated findings that appeared to conflict with the Iowa Utils. Bd. decision. The Commission stated that ordering paragraph (21) of its December 11, 1996 Order would not

require GTE to provide a superior service quality while that issue was being litigated and/or until further order of the Commission. In this manner, the Commission clarified its arbitration decision to assure compliance with federal appellate decisions, but declined to interfere with the non-arbitrated, negotiated issues.

The August Agreement submits both the negotiated provisions and the arbitrated provisions for approval as a single package. The Commission can now review all portions to assure compliance with §§ 251 and 252, as currently interpreted by the federal appellate courts. We do not read the August Agreement as requiring GTE to do things the Iowa Utils. Bd. decision said it was not obligated to do. For instance, GTE believes the Agreement requires it to combine Unbundled Network Elements ("UNEs") at MCI's request. We believe such combinations are not mandated by the Act as currently interpreted by federal appellate courts; however, such combinations are not unlawful if the parties agree or if the Commission finds it may otherwise require such a condition based upon Virginia law. As long as the Eighth Circuit's interpretation stands, we do not believe that GTE has agreed to combine UNEs. Moreover, the Commission's arbitration decisions have not specifically required the

recombination of UNEs.[1] GTE is not obligated to combine UNEs for MCI at this time. Nonetheless, to prevent misconstruction of the August Agreement, the Commission has determined to make a clarification similar to that on the arbitrated superior service quality issue contained in our December 17, 1997 Order. Nothing in the August Agreement shall be interpreted as requiring GTE to act or refrain from acting in a manner contrary to the Iowa Utils. Bd. decision as rendered by the Eighth Circuit or as modified by the U.S. Supreme Court.

GTE and MCI each fault the other for not clarifying or re-negotiating the agreement following the Iowa Utils. Bd. decision. The Commission need not speculate on how much better the agreement would have been had both parties negotiated more conscientiously. GTE has not waived nor negotiated away its right to rely upon the appellate rulings in Iowa Utils. Bd. and MCI need not renegotiate all the points asserted by GTE in its pleadings of August 29, 1997, August 17, 1998, and September 1, 1998. Instead, the Commission approves the August Agreement with the understanding that nothing therein shall cause GTE to act or to refrain from acting contrary to appellate

[1] Our Pricing Order of December 11, 1996, 1996 S.C.C. Ann. Rept. 232, 234 stated, "GTE shall provide any Commission-approved unbundled network element in any technically feasible manner for the provision of telecommunications service in accordance with § 251(c)(3) of the Act. The petitioners may combine such unbundled network elements to provide telecommunications services."

decisions interpreting §§ 251 and 252. With that proviso, the Commission approves the August Agreement and finds that it complies with §§ 251 and 252.

With the approval of the August Agreement, the Commission also denies MCI's Motion to Compel GTE to Execute. GTE's Reply of September 1, 1998, correctly states that § 252(e) does not require submission of an executed agreement when it results from arbitration.[2] While an unexecuted agreement might not be enforceable in most civil courts, it is enforceable pursuant to §§ 251 and 252. The Commission's approval of the August Agreement gives it the force and authority of a Commission order. GTE has pledged not to disobey valid Commission orders and we accept that GTE shall honor its pledge. Accordingly,

IT IS THEREFORE ORDERED THAT:

(1) Pursuant to the Commission's authority to regulate public service companies as authorized by the Va. Const. art. IX, § 2 and § 56-35 of the Code of Virginia, the interconnection agreement submitted by GTE and MCI is hereby approved as complying with § 252(e) of the Act.

[2] Rule C.7. of the Commission's Procedural Rules for Implementing §§ 251 and 252 of the Telecommunications Act of 1996, 20 VAC 5-400-190, requires the parties to submit a "formalized" agreement. "Formalized" does not necessarily equate to executed, since § 252(e) does not require agreements resulting from arbitration to be signed or executed by the parties. Executed contracts are preferred, but where a party such as GTE does not wish to waive or concede issues, it is understandable that such a party would not wish to endorse a document by attaching an officer's signature.

(2) Pursuant to § 252(h) of the Act, a copy of this Agreement shall be kept on file in the Commission's Division of Communications for inspection by the public.

(3) This matter is continued generally for the consideration of a subsequent revision or amendments to the Agreement.